

33391
EB

SERVICE DATE - MARCH 25, 2003
SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42070

DUKE ENERGY CORPORATION
v.
CSX TRANSPORTATION, INC.

Decided: March 21, 2003

Defendant CSX Transportation, Inc. (CSX) has filed a motion to strike portions of the rebuttal evidence filed by complainant Duke Energy Corporation (Duke) in this rate reasonableness complaint proceeding.¹ Duke has filed a reply to that motion. We grant the motion and strike the challenged evidence from the record.

BACKGROUND

Duke seeks to demonstrate that the challenged rates are unreasonable by using the stand-alone cost (SAC) test set forth in Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520 (1985) (Guidelines), aff'd sub nom. Consolidated Rail Corp. v. United States, 812 F.2d 1444 (3d Cir. 1987). The SAC test seeks to determine the lowest cost at which a hypothetical, optimally efficient carrier could provide service to the complaining shipper, and to selected other traffic that would use the same lines and facilities, if the rail industry were free of barriers to entry or exit. Guidelines, 1 I.C.C.2d at 528. To make its case, Duke designed a stand-alone railroad (SARR) that it calls the Appalachia & Carolina Western Railroad (ACW) and submitted evidence on what it would cost to construct and operate the ACW. CSX submitted reply evidence challenging Duke's assumptions and cost evidence in various respects. Duke then submitted rebuttal evidence responding to CSX's criticisms of the opening evidence and modifying its evidence in some respects.

MOTION AND REPLY

In its motion to strike, CSX challenges, as improper rebuttal, two modifications that Duke now proposes to its original design of the ACW. The new challenged proposals are: (1) to change the

¹ In its complaint, Duke challenges the reasonableness of the rates charged by CSX for transporting coal from various mines in Virginia, West Virginia, and Kentucky to Duke's electricity generating facilities located at Brice and Riverbend, NC, and Pelzer, SC. Opening, reply, and rebuttal evidence has been submitted. Simultaneous briefs are due on April 14, 2003.

location of the eastern terminus of the ACW from a point near Fayette, WV (Fayette yard) to a site east of the Gauley River Bridge near Gauley, WV (Gauley yard), thereby eliminating an 8.3-mile segment of line between Gauley and Fayette; and (2) to relocate a rail tunnel in the vicinity of Hagans, VA (Smiley/Hagans tunnel), thereby avoiding the need for track to perform a switchback maneuver to ascend a steep grade at Hagans.

CSX charges that these changes constitute fundamentally different evidence and that allowing such evidence to be offered for the first time on rebuttal would deprive CSX of the opportunity to evaluate and respond to this evidence and to the assertedly substantial ripple effect of these changes on numerous aspects of the SAC analysis (including construction costs, cycle times, car and locomotive requirements, fuel consumption, labor costs, and other operating expenses). CSX asserts that its preliminary review has revealed several errors, miscalculations, and understatement of costs in this new evidence. Additionally, CSX argues that Duke has not shown that these new proposals would be feasible. In its reply, Duke argues that these are minor facility adjustments made in direct response to criticisms presented in CSX's reply evidence, and that they simply correct inadvertent errors that Duke made in its opening evidence.

Eastern Terminus

More specifically, Duke claims that its decision to move the Fayette yard to Gauley was a direct response to CSX's evidence concerning the huge earthworks (grading) costs that would be involved in constructing the yard at Fayette, a point at the bottom of the steepest and narrowest part of the New River gorge. Duke submits that, although its operating witnesses were aware that the New River gorge could present problems depending on where the yard was located, they understood that the yard was being located in the Gauley area. Assertedly, they did not learn that the yard had been mistakenly located at Fayette until receiving CSX's reply evidence.

Duke claims that the change in location on rebuttal is designed to reduce the grading required to an acceptable level. Duke states that this yard is a small, four-track interchange/inspection yard and that the configuration, function, and operation of the yard are unchanged. Duke argues that the only other impacts of the relocation are to reduce the ACW's route mileage by 8.3 miles, which would result in eliminating one ACW mileage block from the formula used by Duke for dividing revenues from cross-over traffic between ACW and a residual CSX (thereby lessening ACW's share of the revenues).²

² Cross-over traffic is traffic that the ACW would not transport as far as CSX now carries that traffic. Instead, the ACW would hand the traffic off to a "residual CSX" at a hypothetical new interchange point (at Gauley under Duke's proposed change). Duke assumes that the revenues would

(continued...)

CSX disputes Duke's assertion that the location of the eastern terminus in Duke's opening evidence was not what Duke had intended. CSX states that the Gauley yard was not the alternative location identified in the workpapers accompanying Duke Energy's opening evidence, but is, in fact, an entirely new location not previously mentioned.³ CSX argues that Duke is not free to reconfigure its SARR on rebuttal simply because it might be advantageous to do so.

Smiley/Hagans Tunnel

In the case of the Smiley/Hagans tunnel, Duke submits that its operating experts knew prior to the filing of opening evidence that the tunnel and trackage should be reconfigured to eliminate the need for a switchback, but inadvertently failed to include the costs for the tunnel realignment needed to eliminate the switchback operation in Duke's opening presentation.⁴ Duke states that it corrected these deficiencies and added the cost of constructing the realigned tunnel in its rebuttal statement in response to questions raised in CSX's reply. Duke argues that this is not a major change, as the reconfigured tunnel would start (at its north portal) at exactly the same point as the tunnel it originally proposed, bore through the same mountain, and exit a short distance west of what previously would have been its south portal. Thus, it claims, the only effect of this change would be avoidance of a need for switchback track—track that was not included in its opening evidence. Duke maintains that no other parts of its evidence would be affected because the operations envisioned by the realigned tunnel and trackage were actually reflected in Duke's opening evidence (which assumed a straight-on operation without any switchback maneuver).

CSX argues that this change in the tunnel's configuration represents a substantial revision to Duke's SAC presentation. The newly proposed tunnel would be nearly a half-mile longer (8,797 feet

²(...continued)

be divided between the two carriers based upon the modified mileage block prorate method that has been used in certain prior SAC cases. Under that method, each carrier obtains one mileage block of credit for each 100 miles (or portion thereof) that it handles the shipment (as well as an additional block if it is the originating or terminating carrier to cover the added cost associated with pick-up and delivery). Here, removal of 8.3 miles of track would evidently reduce the number of 100-mile blocks ACW would have for the traffic that it would interchange to CSX at Gauley rather than Fayette.

³ CSX asserts that it expended significant time and resources analyzing and critiquing the engineering and construction costs that would have been required to build and operate the yard at Fayette, and that a similar effort would be needed to respond to Duke's revised proposal.

⁴ Duke did not include switchback trackage in its original evidence or allow time for a switchback maneuver in its operational plans.

rather than 6,247 feet) and would have a significantly steeper grade (1.28% vs. 0.30%) than the tunnel in Duke's opening evidence. Indeed, CSX argues, the new tunnel would be one of the longest freight rail tunnels in the Eastern United States and would raise significant questions about both the feasibility and the costs of the proposal.

DISCUSSION AND CONCLUSIONS

Rebuttal may not be used in SAC cases as an opportunity to introduce new evidence that could and should have been submitted in the party's case-in-chief. General Procedures for Presenting Evidence in Stand-Alone Cost Rate Cases, STB Ex Parte No. 347 (Sub-No. 3) (STB served Mar. 12, 2001), slip op. at 5. Rather, the proper procedure for introducing new evidence is to file a petition to supplement the evidentiary record.

Here, the challenged evidence is new evidence and not a mere correction of an inadvertent error in its earlier submission.⁵ Duke cites to a rail merger proceeding where a party was allowed to correct an error on rebuttal.⁶ There, however, the witness was only correcting errors in a study that had already been introduced into the record. Here, in contrast, Duke seeks to significantly revise its case-in-chief (its proposed SARR).

While the changes Duke offers address infirmities in its opening evidence that were pointed out in CSX's reply, they go beyond the proper scope of rebuttal. In choosing to redesign the SARR on rebuttal, Duke has gone beyond simply seeking to support what it presented in its opening evidence or adopting evidence submitted by CSX. Fairness dictates that CSX would need an opportunity to address the feasibility and cost of a new SARR design and how that change might alter other evidence in the record. Therefore, in the interest of fairness and orderly handling of the case, we will not accept this evidence on rebuttal. Should Duke choose to file a petition to supplement the evidentiary record, it would need to demonstrate that the material sought to be introduced is central to its case, could not reasonably have been introduced earlier, and would materially influence the outcome of the case.

⁵ Duke suggests that the infirmities in its opening evidence were "due largely to the crush of time in developing its SARR after CSX's belated and incomplete production of essential traffic and train movement information." Reply at 4. If that were so, however, Duke should have sought an appropriate adjustment to the procedural schedule to enable it to present a full and correct case.

⁶ Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company—Control—Chicago and North Western Transportation Company, and Chicago and North Western Railway Company, Finance Docket No. 32133 et al. (ICC served Sept. 12, 1994), slip op. at 17-18.

It is ordered:

1. The motion to strike is granted. All material relating to the proposed relocation of the rail yard and the eastern terminus of the ACW to a site east of the Gauley River Bridge, and the proposed construction of the Smiley/Hagans tunnel to replace the Hagans switchback operation, is stricken from the rebuttal evidence filed November 12, 2002.

2. This decision is effective on the date of service.

By the Board, Chairman Nober and Commissioner Morgan.

Vernon A. Williams
Secretary